UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND

CIVIL MINUTES -- GENERAL

Case No. **CV 10-4839-JFW (MANx)** Date: April 26, 2011

Title: The Boeing Company *-v-* Leonard Robinson

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING PLAINTIFF THE BOEING COMPANY'S MOTION FOR SUMMARY JUDGMENT [filed 2/28/11; Docket No. 111]**

On February 28, 2011, Plaintiff The Boeing Company ("Boeing") filed a Motion for Summary Judgment ("Motion"). On March 18, 2011, Defendant Leonard Robinson, in his official capacity as the Acting Director of the California Department of Toxic Substances Control ("DTSC") filed its Opposition. On March 28, 2011, Boeing filed a Reply. On April 4, 2011, Southern California Federation of Scientists, Los Angeles Chapter of Physicians for Social Responsibility, Rocketdyne Cleanup Coalition, and Committee to Bridge Gap (collectively, "Amici") filed a Revised Supplemental *Amicus Curiae* Brief. On April 7, 2011, Boeing filed a Response to Revised Supplemental Amicus Curiae Brief. The Motion came regularly for hearing on April 11, 2011. After hearing oral argument on the Motion, the Court took the matter under submission. After reviewing the moving, opposing, and reply papers and hearing oral argument, the Court rules as follows:

I. Factual and Procedural Background

In response to the incredibly slow pace of any significant progress in the cleanup of Santa Susana Field Laboratory ("SSFL"), the California legislature passed Senate Bill 990 ("SB 990"), which is codified at California Health & Safety Code § 25359.20. SB 990 prescribes cleanup rules that apply only to SSFL, a former federal nuclear research and rocket testing facility, and criminalizes any sale or disposition of the property until it is cleaned up in accordance with the standards set forth in SB 990. Although the parties strongly disagree on the constitutionality of SB 990, the facts, including the facts related to the history of SSFL, cleanup efforts to date, and the

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enactment of SB 990, are largely undisputed.[1]

A. History of The Santa Susana Field Laboratory.

SSFL occupies approximately 2,850 acres in the Simi Hills in southeastern Ventura County, California, and is a former research and development facility where Boeing has performed a broad range of research and development activities for the federal government in its capacity as a federal government contractor at SSFL. When SSFL was first founded in the late 1940's, it was located in a remote area, and "was chosen for its remoteness in order to conduct work that was considered too dangerous to be performed in more densely populated areas." SB 990(2)(a). As of the date SB 990 was enacted, more than 150,000 people were living within five miles of the site, and at least half a million people were living within 10 miles of the site. Boeing has occupied or owned property at SSFL since the late 1940's and has used it in connection with the work it performed on behalf of the federal government. The federal government has also owned and leased property at SSFL since the early 1950's. Boeing currently owns approximately 2,398 acres of the site. The federal government owns approximately 452 acres of the site, which is currently administered by the National Aeronautics and Space Administration ("NASA") and was previously administered by the United States Air Force. The federal government also leases 90 acres of the site from Boeing, and that leasehold is administered by the Department of Energy ("DOE"). The federal government and Boeing have used SSFL for nearly 60 years to research, develop, and test many pioneering technologies relating to nuclear energy, defense, and space exploration for the United States.

1. Nuclear Research Activities at Santa Susana Field Laboratory.

From the 1950's to the 1980's, acting pursuant to its exclusive authority under the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011, *et seq.*, DOE conducted a federal program at SSFL to research the peacetime use of nuclear energy. Boeing participated in that program in its capacity as a DOE prime contractor, and it set aside a portion of SSFL, which is now known as Area IV, for that activity. DOE operations in Area IV were conducted in a DOE controlled complex known as the Energy Technology Engineering Center ("ETEC") that at its peak included more than 200 buildings and facilities, many of which were constructed and owned by DOE.

It is undisputed that the vast majority of nuclear activity resulting in radiological contamination at SSFL was conducted for or on behalf of DOE. Among other things, DOE owned and operated 16 experimental nuclear reactor facilities or critical test facilities (low-powered reactors). Some of these nuclear facilities were used to research the production of electricity, and others were used to develop energy sources for the federal space program. One DOE reactor – the Sodium Reactor Experiment – alone generated roughly 90 percent of the total contained radioactive waste at SSFL. That reactor experienced a significant core damage accident during federal operations in 1959, resulting in the release of radioactive gases into the atmosphere over a

[1] While the facts in this case are largely undisputed, to the extent any of the facts are disputed, they are not material to the disposition of this Motion. In addition, to the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

period of weeks. DOE also sponsored a variety of nuclear reactor support activities, including nuclear fuel manufacturing, and the decladding of spent irradiated nuclear fuel in the SSFL Hot Laboratory. These and other nuclear research activities performed for or on behalf of DOE resulted in radiological contamination – consisting of "byproduct," "source," and "special nuclear" material – in the soil, groundwater, and bedrock at SSFL. DTSC's 30(b)(6) witness on the cleanup of radiological material at the site admitted that "all" of the radiological contamination in the soil, bedrock, and groundwater at SSFL is "DOE material[ ]."[2]

During the relevant time period, Boeing conducted a relatively minor amount of radiological work in Area IV in a non-federal commercial capacity. Boeing performed that work in the same buildings or areas where the federal work was performed and involved the same radioisotopes and resulting radiological contamination. For example, Boeing, in its private capacity, for a limited period of time operated one nuclear reactor and one critical test facility, and each of these facilities was federally licensed by the Atomic Energy Commission ("AEC") and its successor, the Nuclear Regulatory Commission ("NRC"). Boeing also conducted an additional minimal amount of state-licensed commercial radiological work, including the manufacture and repackaging of "sealed sources" and routine industry activity using radiological materials.[3]

Because of its vastly smaller scale and nature – much of Boeing's routine industrial activity involved the use of "sealed sources" that were frequently tested and never found to have leaked – it is undisputed that it is highly unlikely that Boeing's private commercial activity contributed to any existing contamination at the site. In fact, after more than 40 years of sampling and analysis of the contamination at the site, neither Boeing nor DTSC have been able to identify any radiological contamination at SSFL resulting from Boeing's private commercial activity. In addition, because Boeing's private commercial activity occurred at the same time and in the same buildings as the federal activity and involved the same radioisotopes, even if there is any privately generated radiological contamination at SSFL, such contamination is indistinguishable from and inextricably intermixed with radiological contamination resulting from federal activity. Accordingly, it is virtually impossible to identify and separately remediate any private radiological contamination at SSFL.

2. Federal Rocket Testing Activities at Santa Susana Field Laboratory.

The federal government conducted significant rocket testing activity at SSFL. At the outset, SSFL was designated as a military test site after World War II when North American Aviation, a Boeing predecessor, was awarded a military contract from the United States Air Force to develop the Navaho guided missile system. In 1947, SSFL was designated as the test site for the rocket engine for the Navaho system and it was used to test the rocket engines for ballistic missile

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[2] Radiological contamination, although concentrated in Area IV, has been detected in other areas of SSFL. It is undisputed that the radiological contamination outside of Area IV is also likely the result of federal activities and cannot be attributed to private activities.

[3] This routine industrial activity included relatively small-scale activity such as the use of sealed x-radiography sources and sealed calibration sources; use of gas chromatographs that contained sealed radiological sources; use of sealed destaticsors; possession of smoke detectors and sealed self-powered exit signs; possession of equipment used in "in-service inspection" activities; and use of sealed level, depth, thickness, and density gauges.

systems under military contract during the Cold War. The United States Air Force and NASA, with Boeing as a prime contractor, also conducted liquid propellent rocket engine tests at SSFL from the 1950's to 2006, and many of those engines were ultimately used to power American expeditions into space, including the Apollo and Moon landing missions. In the performance of its work on these government contracts, Boeing constructed six rocket test stand areas. These test stand areas, located both on federally-owned and Boeing-owned areas of SSFL, were operated under federal facilities contracts. Boeing also tested rocket components and fuel in laboratories and other facilities in Areas I, II, and III in support of these federal programs.

As a result of the federal rocket testing and support operations, the soil, bedrock, and groundwater at SSFL became contaminated with a variety of chemicals. For example, contamination resulted from the use of trichloroethylene ("TCE") as a solvent to clean liquid propellant engines and rocket test stands. Incredibly, NASA determined that more than 500,000 gallons of TCE were released into the ground at SSFL as a result of federal rocket testing activities performed for the military or NASA. NASA has also concluded that 97 percent of the total TCE release occurred before the installation of TCE containment system, which, beginning in 1961, was used to prevent the release of TCE directly into the ground. The use of TCE related to liquid propellant engine testing was entirely phased out at SSFL in the 1990's.

It is undisputed that the overwhelming majority of rocket testing activity at SSFL was performed for or on behalf of the federal government, and any private rocket testing occurred well after the installation of TCE containment systems in 1961. As a result, any TCE contamination at SSFL that might have resulted from commercial rocket testing would be *de minimis* compared to the enormous TCE contamination caused by the federal work at the site. In fact, DTSC admits that it cannot identify any TCE contamination resulting from non-federal activity. DTSC also concedes that, to the extent any TCE contamination resulted from such activity, it is indistinguishable from and inextricably intermixed with the contamination caused by the federal rocket testing. Accordingly, it is undisputed that it is virtually impossible to identify and separately remediate any private TCE contamination at SSFL.

In addition to TCE, federal rocket testing, energy research, and other federal activities at SSFL also resulted in chemical contamination, including perchlorate, heavy metal, PCB, dioxin, volatile organic compound, and semivolatile organic compound contamination. Unfortunately, this contamination exists in all operational areas of the site and is not limited to the areas currently owned, controlled, or leased by the federal government. The vast majority of the non-TCE contamination resulted from federal activities, and any of this chemical contamination that resulted from private commercial operations would be minuscule in comparison. Once again, DTSC concedes that it cannot identify or attribute any such chemical contamination to private rather than federal activities, and acknowledges that the commercial activities at SSFL would have been performed in the same areas and used many of the same chemicals as federal activity. As a result, private chemical contamination at SSFL is indistinguishable from and inextricably intermixed with chemical contamination resulting from federal activity, which prevents the separate remediation of the private contamination.

B. Federal Cleanup of Santa Susana Field Laboratory

After decades of seemingly endless delay, Boeing, DOE, and NASA are finally committed to and are currently actively conducting the cleanup at SSFL. During the cleanup, Boeing continues to act as a DOE and NASA contractor. Boeing pays a portion of the cleanup costs, and will be responsible for the portion of the cleanup costs not paid by or recovered from the federal government. In recognition of their respective roles under applicable state and federal laws, prior to the enactment of SB 990, DOE was responsible for the supervision and implementation of the cleanup of radiological waste and DTSC had similar responsibilities for the cleanup of chemical contamination.

1. Radiological Cleanup of Santa Susana Field Laboratory

For more than 40 years, DOE has regulated the cleanup of radiological material in Area IV of SSFL pursuant to its authority under the AEA. The radiological contamination in Area IV has been extensively sampled and analyzed, and the principal sources, types, and locations of contamination have now been identified. This investigation commenced in the 1970's with the decontamination and decommissioning of the radiological facilities in Area IV, and included radiological surveys conducted in 1988 and 1995, and numerous "characterizations" and "final status surveys" associated with footprints of former radiological facilities. Thousands of soil, bedrock, and groundwater samples have been taken in Area IV, and many thousands of pages have been prepared documenting and analyzing the contamination at the site.

In 1996, DOE finally approved procedures governing the cleanup of the radiological contamination located in Area IV. Based on the DOE's procedures, Area IV would be cleaned up to a standard of suburban-residential, recreational, or industrial pursuant to which future users of the site would be exposed to a dose of no more than 15 millirem of radiation per year.[4] There is no serious dispute that this standard is exceedingly conservative, and it is more protective than the standard normally applied by the NRC in decommissioning commercial nuclear facilities. Moreover, the parties agree that compliance with this standard would result in a lower dose of radiation per year than four cross-country round trips on an airplane, and that the 15 millirem per year standard for radiological cleanup fully protects human health and the environment.

2. Chemical Cleanup of Santa Susana Field Laboratory

Prior to the enactment of SB 990 and consistent with its jurisdiction over chemical and radiological contamination, the cleanup of the non-radiological contamination at SSFL had been supervised by DTSC pursuant to the State's generally applicable hazardous waste management laws, California Health & Safety Code, Ch. 6.5, which are modeled in part on the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901, *et seq.*[5]

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[4] The DOE approved procedures rejected an agricultural future land-use assumption as appropriate for SSFL.

[5] Although DTSC argues that RCRA is relevant to this Motion, RCRA excludes from its scope radiological materials regulated under the AEA. RCRA contains a waiver of sovereign immunity for federal facilities, thereby allowing state laws to be applied to the cleanup of non-radiological contamination at those facilities, but only "in the same manner, and to the same extent, as any person is subject to such requirements." 42 U.S.C. § 6961(a)(2).

The chemical contamination at SSFL has been extensively sampled and analyzed, and the principal sources, types, and locations of the chemical contamination have been identified. Under the supervision of DTSC, the chemical characterization process has been ongoing for more than 25 years and it has involved in excess of 35,000 soil, bedrock, and groundwater samples; the preparation of more than 100,000 pages documenting and analyzing the chemical contamination, including 11 RCRA Facility Investigation reports submitted to DTSC, which detail the sources and extent of chemical contamination throughout the site; and the submission of approximately 800,000 pages of historical and technical documents in support of these studies.

In August 2007, pursuant to generally applicable state laws, DTSC, Boeing, DOE, and NASA entered into a Consent Order for Corrective Action ("Consent Order"), which governs the remediation of the chemical contamination at SSFL. The Consent Order did not include and has absolutely no provisions governing the cleanup of the radiological contamination. The Consent Order requires the parties to cleanup chemical contamination to a level that assumes the site will be used for and dedicated to "suburban residential purposes." The cleanup to suburban-residential levels is extremely conservative in light of Boeing's public commitment in October 2007 to preserve the SSFL site for use as "open space parkland" upon completion of the agreed upon cleanup. It is undisputed that the cleanup to the standard required by the Consent Order will fully protect human health and the environment.

C. The Enactment of Senate Bill 990.

After decades of understandable frustration with the lack of progress of the cleanup at SSFL, which, according to proponents of SB 990, "was marred by inconsistent standards and contradictory regulatory responsibilities, " in October 2007, the California legislature enacted SB 990. SB 990 attempts to assert state jurisdiction over the cleanup of DOE related radiological contamination at SSFL. SB 990 prescribes cleanup requirements for both radiological and chemical contamination that are only applicable to SSFL and to no other site in the State. SB 990 differs from generally applicable state and federal environmental laws because it mandates a specific land-use assumption to be used in the risk assessment at SSFL regardless of the actual likely future use of the site.[6] In most cases involving the cleanup of a contaminated site, the reasonably foreseeable land-use assumption for that contaminated site is a key component in the risk assessment and the principal factor in determining the ultimate cleanup standard. Each future land-use scenario – such as agricultural, suburban-residential, or open space – assumes a degree of exposure to residual contamination to a future user of the land through certain "pathways," such as inhalation of air, ingestion of water, and ingestion of food grown or raised on the site. The standard contemplates that a greater assumed exposure requires a more stringent cleanup standard. For example, a site likely to be used as a subsistence farm – the use scenario that assumes the greatest exposure – would require a cleanup to the most stringent standard. Under the normal process – including that applicable at SSFL before the passage of SB 990 – the reasonably foreseeable future use of a site is determined by considering a number of site-specific factors, including the current use of the land, county general plans, topography and natural resources, institutional controls, cultural resources, and endangered species.

[6] Risk assessments determine the risk posed to human health and the environment by the contamination remaining at a site upon completion of a cleanup.

In direct contrast to the normal process, SB 990 establishes a specific pre-determined future land-use assumption – the strictest of suburban-residential or agriculture – to be used in determining the risk assessment. As a practical matter, this statutorily mandated land-use assumption requires Boeing and the federal government to clean up SSFL so that the land could be used for subsistence farming – where full-time residents would obtain all of their food from the site. The legislature apparently decided to unilaterally adopt this standard because no one – not even DTSC – has ever suggested that SSFL will actually be used as a farm any time in the future, nor is there any basis for such a conclusion. SSFL is currently used for industrial purposes, and Boeing has publicly committed to permanently restrict and dedicate its property at SSFL to public use as open space upon completion of a cleanup to the pre-SB 990 suburban-residential standard. Consistent with Boeing's commitment, SSFL is located in an area designated for open space use by local land-use authorities in the Ventura County General Plan. Thus, in passing SB 990, the legislature apparently ignored the fact that DTSC had approved the suburban-residential future land-use assumption for the chemical cleanup at SSFL and that DOE had approved the cleanup criteria for radiological contamination based on a suburban-residential land-use assumption and specifically concluded that an agricultural land-use scenario "is not a reasonable scenario for the site."

SB 990 not only removes any discretion to determine the appropriate land-use assumption, it criminalizes any effort by Boeing or the federal government to "sell, lease, sublease, or otherwise transfer land presently, or formerly occupied by the Santa Susana Field Laboratory" until DTSC "certif[ies] that the land has undergone complete remediation pursuant to the most protective standards in" SB 990. In recognition of the challenges that are presented by SSFL's geology, DTSC has conceded that remediating the groundwater at SSFL to SB 990 standards could take as long as 50,000 years.

D. The Administrative Orders of Consent

In December 2010, DTSC, DOE, and NASA commenced negotiations which, according to counsel, "were not without the typical legal posturing from all parties about SB 990's validity," but resulted in Administrative Orders on Consent ("AOCs") between DTSC, DOE, and NASA that, subject to various conditions and exceptions, would address the radiological and chemical cleanup by DOE and NASA of the soil contamination in Area IV and certain other portions of the site. Unfortunately, the parties were unable to agree on the cleanup of groundwater and associated bedrock even within the agreed upon portions of the site, nor do the AOCs provide for the cleanup of federal contamination at other areas of the site. Boeing is not a party to the AOCs.

II. Legal Standard

Summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Taylor v. List*, 880 F.2d 1040,

1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. Discussion

Boeing seeks summary judgment on its first claim for relief for violation of the Supremacy Clause (Field Preemption), second claim for relief for violation of 42 U.S.C. § 1983 (Supremacy Clause – Field Preemption), and third claim for relief for violation of the Supremacy Clause (Intergovernmental Immunity). According to Boeing, SB 990 is invalid in its entirety under the Supremacy Clause because: (1) it is preempted by the AEA because it regulates the federally occupied field of nuclear health and safety, and (2) it violates the doctrine of intergovernmental immunity by directly regulating the federal government, its contractor, its lessor, and its facilities in a discriminatory manner.[7] Boeing also seeks summary judgment on its sixth claim for relief for violation of the Equal Protection Clause, seventh claim for relief for violation of 42 U.S.C. § 1983 (Equal Protection Clause), eighth claim for relief for violation of the Due Process Clause, and ninth claim for relief for violation of 42 U.S.C. § 1983 (Due Process Clause). According to Boeing, SB 990 is invalid in its entirety under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it: (1) singles out one site for uniquely onerous rules that do not apply anywhere else in the State; (2) serves no legitimate State interest; and (3) is not rationally related to any such interest.

[7] Boeing has not moved for summary judgment on its fourth claim for relief for violation of the Supremacy Clause (Conflict Preemption) or its fifth claim for relief for violation of 42 U.S.C. § 1983 (Supremacy Clause – Conflict Preemption).

A. SB 990 Violates the Supremacy Clause.

1. Statutory and Regulatory Overview.

Congress initially passed the AEA in 1946 to promote the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206-07 (1983). The AEA created the AEC, and gave the federal government – through the AEC – monopoly power over nuclear technology and nuclear materials. In 1954, the AEA was amended to allow private industry to develop atomic energy for commercial purposes, including nuclear power generation, under a program of federal regulation and licensing. "In 1959, Congress amended the AEA in order to 'clarify the respective responsibilities of . . . of the States and the [Atomic Energy] Commission with respect to the regulation of byproduct, source, and special nuclear materials.'" *Pac. Gas*, 461 U.S. at 208-09 (*quoting* 42 U.S.C. § 2021(a)(1)). The 1959 Amendment heightened the states' role by allowing them to enter into an agreement with the AEC to obtain regulatory authority over certain materials under limited conditions. However, the subject matter of those agreements is limited by the 1959 Amendment, which specifically provides the AEC with authority and responsibility to regulate the construction and operation of any nuclear facility and the disposal of nuclear materials that the AEC determines should not be disposed of without a license from the AEC.

The AEA was subsequently amended to separate the agency's licensing and regulatory functions from its nuclear weapons and energy development functions. Under the amended AEA, the AEC was abolished, and the responsibility for developing sources of energy and managing the nuclear weapons complex was given to the DOE. In addition, NRC was created to license and regulate commercial nuclear power. Thus, as amended, the AEA creates a dual regulatory structure for atomic energy, with the NRC regulating commercial nuclear power, and DOE managing the nuclear weapons complex.

The AEA regulates three different classes of radioactive material: "source" material, "special nuclear" material, and "byproduct" material. 42 U.S.C. § 2014(e), (z), and (aa). "Source" material includes uranium, thorium, and other materials that DOE deems necessary for the production of "special nuclear" material. 42 U.S.C. §§ 2014(z) and 2091. "Special nuclear" material includes plutonium, enriched uranium, and other material capable of releasing substantial quantities of atomic energy. 42 U.S.C. §§ 2014(aa) and 2071. "Byproduct" material includes "(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e). The AEA grants DOE and NRC exclusive responsibility for regulating source, special nuclear, and byproduct material. 42 U.S.C. § 2201(b) and (i)(3). "Pursuant to this authority, DOE has developed and implemented an extensive regulatory regime for managing radioactive materials and limiting the release of radioactivity," which is designed to assure that the public, workers, and the environment are not exposed to unsafe levels of radiation. *United States v. Kentucky*, 252 F.3d 816, 821 (6th Cir. 2001).

In 1976, Congress passed RCRA, which amended the Solid Waste Disposal Act of 1965, 42

U.S.C. §§ 6901 *et seq*., to end the environmental and public health risks associated with the mismanagement of hazardous waste. *See Kentucky*, 252 F.3d at 822. Generally, RCRA prohibits the treatment, storage, or disposal of hazardous waste at private or governmental facilities without a permit issued by either the United States Environmental Protection Agency ("EPA") or an authorized state agency, and it expressly contemplates that state and local governments will take a lead role in hazardous waste regulation. *Id.* Under RCRA, hazardous waste is defined as "solid waste, or [a] combination of solid wastes[,]" that, for enumerated reasons, creates public health and environmental dangers. 42 U.S.C. § 6903(5). However, "solid waste" does not include "source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954." 42 U.S.C. § 6903(27). RCRA expressly excludes those materials. Specifically, RCRA provides:

> Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to ... the Atomic Energy Act of 1954 except to the extent that such application (or regulation) is not inconsistent with the requirements of such Act[ ].

42 U.S.C. § 6905(a).

2. SB 990 is Preempted by the Atomic Energy Act of 1954.

a. Preemption.

The Supremacy Clause mandates that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, Cl. 2. Thus, Congress may preempt state law so long as it acts within its constitutionally delineated powers. *See M'Culloch v. Maryland*, 17 U.S. 316, 427 (1819) ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."). The Supreme Court has established a general framework by which preemption questions are analyzed:

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); *see, also,* Tribe, 1 *American Constitutional Law* 1172 (3d ed. 2000) (under field preemption, "states are deemed powerless to act because of a vacuum deliberately . . . created by federal legislation. In such cases, *any* state or local action, however consistent its substantive content might be with the content of relevant federal statutes, is held invalid."); *Pacific Merchant Shipping Ass'n v. Goldstene*, __ F.3d __, 2011 WL 1108201, *8 (9th Cir. Mar. 28, 2011) (holding that "[f]ield preemption arises when state law 'regulates conduct in a field that Congress intended the Federal Government to occupy

exclusively.'") (*quoting English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

b. SB 990 Impermissibly Regulates the Field of Nuclear Health and Safety.

In the context of nuclear regulation, the Supreme Court has consistently held that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states."[8] *Pac. Gas*, 461 U.S. at 212. To determine if a state law is preempted by the AEA, "the test ... is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *Id.* at 213 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)). Thus, the AEA preempts a state law if: (1) the purpose of the state law is to regulate against radiation hazards; or (2) the state law directly affects decisions concerning radiological safety regardless of the state legislature's asserted purpose for the law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990); *see, also, U.S. v. Manning*, 527 F.3d 828, 831 (9th Cir. 2008) (finding that state law was preempted because "it regulates within the field that is occupied by the AEA," and it would have a direct and substantial effect on the DOE's ability to make decisions about radioactive waste disposal); *U.S. v. Kentucky,* 252 F.3d 816 (6th Cir. 2001) (finding state law that attempted to regulate AEA regulated materials at DOE facility "based on the [state's] safety and health concerns" was preempted).

In this case, SB 990 regulates squarely within the preempted field of nuclear health and safety.[9] The expressed purpose of SB 990 is "to protect the public health and safety and the

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[8] For example, in *Pacific Gas*, which addressed a California statute that conditioned the construction of nuclear power plants on findings by a state agency that adequate storage facilities and means of disposal were available, the Supreme Court held that "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Pac. Gas*, 461 U.S. at 212.

[9] Despite Amici's arguments to the contrary, Boeing does have standing to bring this action. Boeing, as a private party, can challenge SB 990 on preemption grounds. "Under well-established law of the Supreme Court, [the Ninth Circuit], and other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law." *Indep. Living Ctr. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008). The rationale for this principle is clear: a "cause of action based on the Supremacy Clause . . . is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is not rights-based." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851 (9th Cir. 2009). In addition, Boeing has been injured by the enactment of SB 990. SB 990 has caused Boeing to sustain, and will continue to cause Boeing to sustain, harm in the form of substantial additional expenses and demands on its resources and time that did not exist prior to SB 990. The Court has considered Amici's argument that, as a result of the AOCs, any additional costs of remediation will be borne by the federal government and not Boeing and finds that this argument is not supported by the evidence and, therefore, is unpersuasive. In addition, the AOCs, to which Boeing is not a party, only address the federal contamination in the soil in Area IV and certain other portions of SSFL, and do not address the federal contamination in the groundwater and associated

environment" by requiring "complete remediation pursuant to the most protective standards." Cal. Health & Safety Code § 2539.20(1)(a) and (e). This purpose is also expressly stated in SB 990's legislative history, which discusses "various piecemeal cleanups around the SSFL site . . . undertaken with varying degrees of protective quality" and also discusses "inadequate characterization and cleanup" by DOE. SB 990 Assembly Floor Analysis 3 (Sept. 1, 2007). The legislative history also details the past DOE radiological activity at the site and criticizes DOE's cleanup, asserting that "the DOE cleanup was not adequately protective of public health" and explaining that by placing the cleanup of radiological materials under State authority, "this bill will simply ensure that the SSFL cleanup is done thoroughly and completely to an appropriately protective standard for the community and environment."

In its Opposition, DTSC admits that SB 990 was "enacted in response to significant public health concerns regarding exposure to radioactive" and other contaminants, and describes SB 990 as "California's efforts to protect future generations" by "remedy[ing] the harmful legacy of an era when the heady prospects for nuclear energy were pursued without an understanding of the public health and environmental consequences." Opposition, pp. 1 and 22. DTSC also concedes that SB 990 was enacted to address "public health, safety, and environmental concerns," and that it represents the State's "decision to cleanup property to the fullest extent possible to protect public health and safety." Opposition, pp. 25-26.

DTSC's argument that SB 990 is merely a land-use statute is unpersuasive. The statute's language and legislative history demonstrate that SB 990 is a cleanup statute focused on public health and safety. There is no evidence that would support an argument that SB 990 was enacted as a land-use statute, and DTSC concedes that "SB 990 does not determine the eventual land use for the SSFL." Opposition, p. 11. While DTSC argues that the "primary focus" of SB 990 is "ensuring the widest potential land use for the SSFL property," this purported focus is entirely inconsistent with a statute that could potentially restrict the transfer or lease of the property for centuries. In fact, beyond making it a crime to transfer or lease SSFL during its cleanup, SB 990 does not regulate how SSFL can or should actually be used in the future.

Therefore, in light of the undisputed evidence, including the text of SB 990, the legislative history of SB 990, and DTSC's admission that SB 990 was enacted to "impos[e] a stringent cleanup standard" for radiological and other contamination at SSFL, the Court, albeit reluctantly, concludes that SB 990 is an attempt to regulate squarely within the federally occupied field of nuclear health and safety and, therefore, it is preempted by the AEA. *Pacific Merchant Shipping Ass'n*, __ F.3d __, 2011 WL 1108201, at *8; *English*, 496 U.S. at 84 (holding that "another part of the [preempted] field is defined by the state law's actual effect on nuclear safety").

c. Authority for SB 990 Has Not Been "Expressly Ceded" to California.

DTSC vigorously argues that SB 990 is not preempted because it regulates in an area that it

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bedrock, which must be cleaned up to the stringent standards of SB 990.

contends has been ceded to California under the AEA's Agreement State provision. As discussed above, the AEA was amended in 1959 to provide for partnership and joint responsibility between the States and the AEC (now the NRC) with respect to control of radiation hazards associated with specified nuclear materials. 42 U.S.C. § 2021(a)(2) and (4). Specifically, under Section 274(b), AEC (and, upon its creation, NRC) was given the authority "to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the [AEC and, subsequently, the NRC] under Chapters 6, 7, and 8 and section 161 of the [Atomic Energy] Act" to license the private commercial handling and use of byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. 42 U.S.C. § 2021(b).

In 1962, California and the former AEC entered into a written agreement in which the State was ceded "Agreement State" authority under the AEA ("1962 Agreement"). The 1962 Agreement delegated certain authority to California to enact rules, regulations, or orders to "protect public health or to minimize danger to life or property resulting from byproduct, source, or special nuclear material contamination." Specifically, the 1962 Agreement between California and the AEC provides, in part:

> Subject to the exceptions provided in Articles II, III, and IV [of the Agreement], the Commission [then the AEC, now the NRC] shall discontinue . . . the regulatory authority of the Commission in the State under Chapters 6, 7, and 8, and section 161[10] of the Act with respect to the following materials:
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> A. Byproduct materials;
> B. Source materials; and
> C. Special nuclear materials in quantities not sufficient to form a critical mass.

Although the 1962 Agreement references Section 161 of the AEA, there is nothing in the 1962 Agreement that purports to delegate to California any authority over DOE activity, DOE prime contractors, or DOE related AEA materials. The absence of such a provision in the 1962 Agreement is consistent with the case law interpreting the AEA, which holds that under the AEA, DOE, and not the NRC, has exclusive authority over DOE research activities and cleanup of any resulting contamination.[11] 42 U.S.C. §§ 2018, 2140(a); *see, also, Pac. Legal Found. v. State*

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[10] Section 161 of the AEA provides, in part, the authority to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable . . . to protect health or to minimize danger to life or property."

[11] In addition, Agreement States are precluded from playing any role in several significant areas of regulation, including "the construction and operation of any production or utilization facility or any uranium enrichment facility." 42 U.S.C. § 2021(c)(1). Thus, Agreement States lack authority over AEA materials that result from the operation of nuclear reactors or nuclear fuel manufacturing because the authority to regulate the operation of nuclear reactor and the manufacturer of nuclear fuel necessarily includes the cleanup of radiological contamination resulting from such activities. *Northern States Power Co. v. State of Minn.*, 447 F.2d 1142, 1149 (1971); *Missouri v. Westinghouse Elec., LLC*, 487 F.Supp. 2d 1076, 1087 (E.D. Mo. 2007); *see, also,* 10 C.F.R. § 150.15(a)(1)(I). Because the legislative history specifically refers to the

Energy Res. Conserv. & Dev. Comm'n, 659 F.2d 903, 920 n. 26 (9th Cir. 1981), *aff'd sub. nom. Pac. Gas*, 461 U.S. 190. The DOE has sole responsibility for issuing orders governing its environmental cleanup procedures and more general environmental and radiological safety at its sites. *NRDC v. NRC*, 606 F.2d 1261, 1266 (D.C. Cir. 1979); 42 U.S.C. § 2121(a)(3). In light of DOE's exclusive authority over its activities and AEA materials, the AEC simply lacked the power to delegate to California any authority over DOE activities. NRC's regulations implementing the Agreement State program specifically acknowledge this lack of power and clearly provide that states have no regulatory authority over DOE activities. *See, e.g.,* 10 C.F.R. § 150.3 (excluding "Government agencies" from definition of "person" subject to state license authority); *NRC Procedure SA-500: Jurisdiction Determinations*, at 2 (Sept. 25, 2007) (NRC agreements with states do "not transfer regulatory authority to the States over . . . [a]ctivities of Federal Agencies located in Agreement States"). As a result, authority to regulate the cleanup of AEA material related to DOE nuclear research activities at SSFL could not and was not ceded to California and that cleanup remains within the field of nuclear regulation subject to exclusive federal authority, and any attempt to interpret the 1962 Agreement as providing such delegation would be inconsistent with the NRC's regulations. *Wash. State Bldg. and Trades Council*, 684 F.2d 627. Accordingly, the Court concludes that there are no provisions in the 1962 Agreement that provide for the delegation to California of authority over the cleanup of AEA material related to DOE nuclear research activities.[12]

DTSC's Agreement State argument is further flawed because DTSC, the state agency that administers SB 990, is not the state agency designated under the 1962 Agreement to assume the regulatory functions of NRC. Only states with nuclear regulatory schemes "coordinated and compatible" with federal law may become Agreement States. 42 U.S.C. § 2021(g). Agreement States must designate an agency with personnel "competen[t] to evaluate various potential radiological hazards" to assume the licensing functions of NRC. NRC closely supervises the regulatory activities of Agreement States, and, as a condition of retaining Agreement State status, the designated state agency is required to undergo periodic audits by NRC. In California, it is undisputed that the state agency designated to assume licensing authority from NRC is the California Department of Public Health, not DTSC. Therefore, as DTSC has acknowledged, DTSC is not subject to any actual oversight by NRC. DTSC failed to offer any argument or explanation as

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meltdown of the DOE's nuclear reactor (Sodium Reactor Experiment) and the resulting radiological contamination from that meltdown, DTSC certainly cannot and does not contest that SB 990 purports to regulate the cleanup of contamination resulting from the operation of nuclear reactors and the manufacture of nuclear fuel, which are two areas that cannot be ceded to California. *Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (holding that Washington's Agreement gave it only limited control over low-level radioactive waster and states cannot use delegated authority to thwart federal objectives).

[12] Even to the extent that DTSC argues that it has been ceded authority under the 1962 Agreement to regulate and oversee the cleanup of any private commercial radiological contamination at SSFL, DTSC has not identified any private commercial radiological contamination at SSFL, and has conceded that the vast majority, if not all, of the existing contamination at SSFL consists of "DOE materials for which we do not have regulatory authority," and that even if there were private radiological contamination at SSFL, it would be inextricably intermixed with federal contamination.

to why the Agreement State provision would allow DTSC to administer SB 990 when the Department of Public Health is the agency that assumed licensing authority from NRC and DTSC is, in fact, subject to no oversight at all by NRC.

Similarly, the AOCs recently negotiated between DTSC, DOE, and NASA do not affect the Court's conclusion that SB 990 is preempted. Boeing is not a party to the AOCs, which were negotiated after the passage of SB 990 and are contingent on the occurrence of various conditions. In addition, the AOCs are not even remotely consistent with the cleanup requirements of SB 990. The AOCs only address the cleanup of the soil in Area IV and certain other areas of SSFL, and fail to address the cleanup of the groundwater and associated bedrock. Moreover, the AOCs do not have the force of law, and nothing other than an act of Congress can open this field to regulation by the State. Thus, the federal government cannot, despite DTSC's implication to the contrary, "waive" its right to exclusively regulate the field of nuclear health and safety by simply agreeing to the AOCs. Because Congress has preempted the field, the California legislature was powerless to act when it enacted SB 990, and no subsequent event can save SB 990.

3. SB 990 Violates the Doctrine of Intergovernmental Immunity.

a. A State Law Cannot Directly Regulate or Discriminate Against a Federal Contractor, Lessor, or Facility.

The intergovernmental immunity doctrine prohibits states, without congressional authorization, from "directly regulat[ing] the Federal Government's operations or property." *Blackburn v. U.S.*, 100 F.3d 1426, 1435 (9th Cir. 1996). It also prohibits states, without congressional approval, from "discriminat[ing] against the Federal Government or those with whom it deals." *North Dakota v. U.S.*, 495 U.S. 423, 437 (1986). This prohibition on state regulation of federal activity also applies to federal contractors. *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665, 669 n. 4 (8th Cir. 1987); *see, also, Moses Lake Homes v. Grant County*, 365 U.S. 744, 751 (1961) ("If anything is settled in the law, it is that a State may not discriminate against the Federal Government or its lessees."). Because the "sovereign can only act through its agents," (*Kentucky ex rel. Hancock v. Ruckelshaus*, 497 F.2d 1172, 1175 (6th Cir. 1974), *aff'd sub nom. Hancock*, 426 U.S. 167), state law "must give way" whenever it regulates the federal government's conduct in a discriminatory manner, regardless of "whether the United States exercises its rights directly or through the use of private persons." *Union Oil Co. v. Minier*, 437 F.2d 408, 411 (9th Cir. 1970).

In addition, "[i]t is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988). This rules applies even when "the facility is operated by a private party under contract with the United States." *Id.* (holding that a "federal installation" may be "federal owned or operated"); *see, also, Hancock*, 426 U.S. at 180 (invalidating a state clean air licensing scheme as applied to an AEC nuclear production facility operated by a private contractor).

b. SB 990 Directly Regulates and Discriminates Against a Federal Contractor, Lessor, and Facility.

SB 990 directly regulates Boeing, as a federal contractor and lessor, and the federal government by permitting DTSC "to compel" Boeing, DOE, and NASA "to take or pay for appropriate removal or remedial action necessary to protect the public health and safety and the environment at the Santa Susana Field Laboratory site." Cal. Health & Safety Code § 25359.20(a). In addition, it is undisputed that SB 990 singles out Boeing, DOE, NASA, and the SSFL site for a cleanup scheme that applies solely to SSFL, is the most restrictive in California, and is more stringent than that required for park use or suburban-residential use under generally applicable law. For example, it is undisputed that SB 990 would require cleanup of one radionuclide of concern, cesium-137, to levels 50 times more stringent than the suburban-residential standard to which Boeing had agreed pre-SB 990, and 2,000 times more stringent than what would be required under generally applicable law if the reasonably foreseeable use of SSFL was open space. These stringent standards result from SB 990's mandate of a particular land-use assumption without regard to how the land is likely to be used, which is a departure from generally applicable state law that typically bases the cleanup standard on the reasonably foreseeable use of the land. *Compare* Cal. Health & Safety Code § 25356.15(d) *with* Cal. Health & Safety Code § 25359.20(1)(c). In addition, unlike generally applicable law, Boeing, DOE, and NASA are prohibited from transferring any part of the land at SSFL until SB 990's stringent cleanup requirements are satisfied. Cal. Health & Safety Code § 25359.20(d). Thus, SB 990 treats Boeing, as both a federal contractor and lessor, the federal government, and SSFL far less favorably than it treats other contaminated sites and potentially responsible parties. *North Dakota v. U.S.*, 495 U.S. 423, 438 (1990) (holding that a state "discriminate[s] against the Federal Government and those with whom it deals [if] it treats someone else better than it treats them."). Accordingly, the Court concludes that SB 990 violates the doctrine of intergovernmental immunity and, therefore, violates the Supremacy Clause.

c. None of the Exceptions to the Intergovernmental Immunity Doctrine Apply in this Case.

The well recognized exception to the doctrine of intergovernmental immunity exists when "Congress provides 'clear and unambiguous' authorization for such regulation." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988). However, the Court concludes that there is no such authorization in this case. "Neither the AEA nor any other federal law waives federal immunity from regulation of DOE facilities by states with respect to materials covered by the AEA." *Kentucky*, 252 F.3d at 825; *Pac. Legal Found.*, 659 F.2d at 920 n. 26 (holding that, under the AEA, States are "not authorized to regulated activities of the [DOE] itself," even for purposes unrelated to nuclear health and safety). Defendant attempts to argue that the limited waiver of immunity in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which permits the application of certain state cleanup laws to sites owned or operated by the federal government, applies in this case. However, CERCLA did not overturn the AEA's preemptive regime. *U.S. v. Manning*, 434 F.Supp. 2d 988, 996-97 (E.D. Wash. 2006), *aff'd*, 527 F.3d 828; *see, also,* 42 U.S.C. § 9620(a)(4). Moreover, even with respect to the non-AEA contamination at SSFL, SB 990 exceeds the scope the CERCLA waiver because the CERCLA waiver "shall not apply to the extent a State law would apply any standard or requirement to such facility which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality." 42 U.S.C. § 9620(a)(4).

In addition, there can be no serious argument that SB 990 was authorized by RCRA's

waiver of immunity. It is clear that SB 990 was not enacted pursuant to California's RCRA authority, and, even if it had been, RCRA expressly excludes AEA materials from the scope of its waiver. 42 U.S.C. §§ 6903(5) and (27), and 6905(a). Moreover, RCRA, like CERCLA, does not authorize the imposition of more stringent cleanup requirements at a federal facility than those that apply elsewhere in California, but, instead, allows cleanup of federal contamination only "in the same manner, and to the same extent, as any person is subject to such requirements." 42 U.S.C. § 6961(a)(2).

DTSC's argument that the intergovernmental immunity doctrine does not apply because SB 990 no longer interferes with activities of the federal government in light of the AOCs is unpersuasive. The AOCs apply only to the cleanup of soil contamination within NASA-owned portions of SSFL and Area IV and exclude the cleanup of federal contamination of the groundwater and associated bedrock. In addition, although the parties to the AOCs, which does not include Boeing, have apparently agreed that the limited cleanup will satisfy SB 990, there is no such agreement as to future cleanup. Accordingly, SB 990 would continue to govern the future cleanup of federal contamination in the remaining areas of SSFL and the federal contamination in the groundwater and associated bedrock existing at SSFL.

DTSC's argument that intergovernmental immunity does not apply because Boeing has no ongoing relationship with the federal government is also unpersuasive. As discussed above, it is undisputed that Boeing is currently conducting ongoing federal cleanup operations at SSFL as a DOE and NASA prime contractor. Moreover, even if Boeing was simply a former federal contractor, SB 990 would still violate the well established doctrine of intergovernmental immunity because a contrary conclusion would interfere with the federal government's ability to select contractors by chilling contractors from dealing with the federal government if they could subsequently be discriminated against by states because of their status as a former federal government contractor. *Davis*, 489 U.S. at 814; *Leslie Miller, Inc. v. Ark.*, 352 U.S. 187, 189-90 (1956) (holding that intergovernmental immunity bars state regulation interfering with the government's ability to select contractors); *see, also, Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 814 (1989) (holding that, with respect to intergovernmental immunity, "it does not follow that private entities or individuals who are subjected to discriminatory [state regulation] on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary.").

Similarly, DTSC's argument that SB 990 singles out Boeing as a private company and landowner rather than a federal contractor is unpersuasive. There is no basis for such a distinction in light of the undisputed evidence. It is undisputed that Boeing conducted operations on behalf of the federal government at SSFL for more than 50 years and that SB 990 expressly regulates the cleanup of contamination resulting from those activities. DTSC does not dispute that the vast majority of activity at SSFL was performed for or on behalf of the federal government, that the vast majority of contamination at the site resulted from those activities, and that any contamination resulting from private activities is *de minimis* compared to the federal contamination. More importantly, the California legislature relied almost exclusively on the history of federal activity and the resulting contamination as its justification for enacting SB 990, and DTSC itself cites this same federal activity, including the 1959 "partial meltdown" of DOE's Sodium Reactor Experiment, as "unique circumstances" justifying SB 990.

4. SB 990 is Invalid in Its Entirety.

Because SB 990 unconstitutionally regulates a federally occupied field and violates the doctrine of intergovernmental immunity, the law fails in its entirety. It is undisputed that any private contamination at SSFL is inextricably intermixed with and indistinguishable from the federal contamination, and it is impossible to apply SB 990 to only the private contamination at the site. Therefore, under the specific facts of this case, any attempt to implement SB 990 will be barred by the Supremacy Clause. For example, in *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1236 and 1240 (1985), the Seventh Circuit held that the AEA "preempts a request for a state-law injunction to remove nonradioactive hazards when the nonradioactive and radioactive materials are inseparable." Similarly, the Ninth Circuit invalidated a law in its entirety that unavoidably regulated "the radioactive component of mixed waste, as well as the nonradioactive component, for health and safety reasons." *Manning*, 527 F.3d at 837-39; *see, also, Kentucky*, 252 F.3d at 823-24 (invalidating the law as a whole where the state sought to regulate non-radiological "solid waste [that] may be contaminated with radionuclides").

However, even if there was private contamination at SSFL that was not inextricably intermixed with federal contamination and which could be identified, SB 990 would still fail. In enacting SB 990, the California legislature identified factors in SB 990 that, in the legislature's view, justified the application of strict cleanup requirements only to SSFL, and not to any of the many other contaminated sites in California. As discussed above, the factors identified by the legislature were based on federal historical activities, accidents, and the resulting contamination, all of which are beyond California's authority to regulate. Because the reason for imposing such strict requirements for the cleanup of the federal contamination at SSFL is beyond California's authority to regulate, there is no legitimate basis in SB 990 for applying these requirements to any private contamination at SSFL. *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 133 (1913).

Finally, any effort to save SB 990 by attempting to carve out the portion related solely to private contamination would fail because the invalid portion of SB 990 cannot be removed "without affecting the wording of any of the measure's other provisions." *Hotel Emps. & Rest. Emps. Int'l Union*, 21 Cal. 4th 585, 612-13 (1999). SB 990 expressly mandates procedures that must be applied to the site as a whole. For example, SB 990 requires that "[i]n calculating the risk, the cumulative risk from radiological and chemical contaminants at the site shall be summed." Cal. Health & Safety Code § 25359.20(1)(c). Because the Supremacy Clause bars the application of SB 990 to the federal contamination, it would be impossible to "sum" the risks for the entire site and to develop a meaningful "cumulative risk" assessment. The absence of the cleanup of the federal contamination would prevent the comprehensive approach to the cleanup mandated by SB 990, and, thus, SB 990 must fail in its entirety. *Manning*, 527 F.3d 840 (holding that to construe "the remaining section of [the law] as limited to" private commercial activities or contamination "would require . . . examin[ing] and rewrit[ing] most of the statute in a vacuum as to how the various provisions were intended to intersect and in a way that would be at odds with the purpose of the statute.").

For all the foregoing reasons, the Court **GRANTS** Boeing's Motion as to its first, second, and third claims for relief.

IV. Conclusion

For all the foregoing reasons, Boeing's Motion is **GRANTED** with respect to its first, second, and third claims for relief. Based on the Court's discussion with counsel at the hearing and recognizing the need for prompt appellate review of this Order, the Court has concluded that it is appropriate to enter final judgment under Rule 54(b) on Boeing's first claim for relief for violation of the Supremacy Clause (Field Preemption), second claim for relief for violation of 42 U.S.C. § 1983 (Supremacy Clause – Field Preemption), and third claim for relief for violation of the Supremacy Clause (Intergovernmental Immunity), and that there is no just reason for delaying the entry of final judgment as to those claims. Counsel shall meet and confer and prepare an agreed upon proposed Judgment with appropriate findings under Rule 54(b). Counsel shall lodge the agreed upon proposed Judgment with the Court by May 3, 2011.

IT IS SO ORDERED.

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